United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Original w/affidavit of mailing

75-1415

To be argued by
GARY A. WOODFIELD

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PHS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1415

UNITED STATES OF AMERICA,
Appellee,

—against—

BERNARD SCHIFTER,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
United States Attorney,
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Assistant United States Attorneys,
Of Counsel.

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TABLE OF CASES

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Preliminary Statement

This is an appeal from a judgment of conviction, entered on December 5, 1975, by the United States District Court for the Eastern District of New York (Platt, *J.*), following a jury trial convicting the appellant, Bernard Schifter, of unlawfully possessing a quantity of stolen camera lenses and accessories that had been stolen from John F. Kennedy International Airport in violation of Title 18, United States Code, Sections 549 and 659. Appellant was sentenced pursuant to the provisions of Title 18, United States Code, Sections 4208(b) and (c), for study and report for eventual sentence modification.[1] He

[1] Pending final imposition of sentence, appellant was sentenced to two years imprisonment on Count One and ten years imprisonment on Count Two. This appeal is properly filed despite the fact that a final sentence has not been imposed. *Corey* v. *United States*, 375 U.S. 169, 172-73 (1963).

was also fined $5,000. Appellant is free on bail pending this appeal.

On appeal, appellant contends that the district court erred in allowing the Government to introduce admissions appellant made after his arrest, and further erred in its instructions to the jury concerning these admissions. Also, appellant claims the district court improperly allowed the introduction into evidence of the stolen goods found in his possession at the time of arrest, contending that there was insufficient probable cause to arrest appellant thus, invalidating the subsequent seizure of goods from his automobile.

Statement of Facts

1. On August 8, 1974, American Airlines inventory agent Jim Hughes discovered a shortage of nineteen cartons of Konica cameras, lenses and accessories in building 123, a cargo warehouse, at John F. Kennedy Airport, Queens, New York (136, 137).[2] This merchandise, valued at $27,815.30, was imported from Japan and was being stored in bond awaiting delivery to Koniphoto Corporation, Woodside, New York (133, 134, 143).

In September, 1974, the appellant Bernard Schifter, who operated a gas station at 107th Street in Brooklyn, inquired of another local businessman, August Zolfo, manager of RPM Bargain Mart, whether he was interested in buying camera lenses appellant had in his possession (151, 152). The next day appellant provided Zolfo with one of the lenses for his inspection (153). Eventually, through the lense serial number, federal authorities were led to Zolfo who provided them with the lense he had received from appellant. Upon learning that it was stolen, Zolfo cooperated with the authorities. Zolfo called appel-

[2] References are to trial transcript unless otherwise noted.

lant and made arrangements for Joseph Giordano, a detective with the New York Port Authority Police working in an undercover capacity, to purchase the camera lenses from appellant the next morning (155).

On September 20, 1974, Giordano, equipped with a body recorder and transmitting device, met appellant in his gas station office where they discussed the sale of the camera lenses (161, 162). They agreed on the sale of twenty-one lenses for one thousand dollars (162). After paying appellant the money in one hundred dollar bills, Giordano and appellant proceeded to appellant's parked station wagon (162, 163). Giordano observed two boxes, one with a camera lense visible, in the rear of appellant's automobile (160). Appellant showed Giordano a box of camera accessories and stated to Giordano "we have 400 cameras, too" (163, 164).[3]

Pursuant to a pre-arranged signal, fellow law enforcement officers entered the gas station and placed appellant and Giordano under arrest (165). After appellant was advised of his rights in accordance with *Miranda* v. *Arizona*, 384 U.S. 464 (1968) by U.S. Customs Agent Mark Thornton, he was searched by fellow Agent Thomas Maxwell (249, 250, 173). Found in appellant's pocket were the ten one hundred dollar bills given him by Giordano (178, 251). After being readvised of his rights, appellant stated to Maxwell that the one thousand dollars was for "gas money" (178, 179). Found in appellant's station wagon at the time of his arrest were nineteen camera lenses and a box of camera accessories all from the August 9, 1974 stolen shipment (277, 278).

Thereafter, appellant was transported to the U.S. Custom offices for processing. After being readvised of

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[3] Besides the lenses and accessories, approximately four hundred cameras were stolen from the cargo warehouse on August 9, 1974 (140, 141, Exhibit 2).

his rights, appellant, in response to questions by the agents regarding his possible cooperation, stated that if he cooperated, "his bones would be spread all over the airport" (253).

2. Prior to the commencement of the trial, appellant moved to suppress the post-arrest statements and the stolen merchandise recovered from his automobile at the time of his arrest. At the pre-trial hearing, Agent Thornton testified concerning the arrest of appellant and subsequent seizure of two boxes containing camera lenses and accessories from his automobile. Agent Thornton testified that upon receiving a radio communication from fellow agents on surveillance indicating that the transaction between Giordano and appellant had occurred, he moved in and placed appellant under arrest (S 8, 18).[4] Agent Thornton observed appellant and Giordano standing together at the rear of appellant's station wagon (S 5). Inside the open tail gate of appellant's auto were two large containers (S 5, 6). After arresting appellant and orally advising him of his rights, fellow Agent Maxwell recovered $1,000 from appellant's pants pocket (S 8, 11). In response to Agent Maxwell's question concerning this money, appellant stated that it was "gas money" (S 10, 11). Appellant was transported to the U.S. Custom's offices for processing at which time Agent Thornton readvised appellant of his rights by reading to him from a rights card (S 12-14). While being transported to the U.S. Magistrate's for arraignment, in response to an inquiry concerning his possible cooperation, appellant stated that if he cooperated ". . . his bones would be all over the airport" (S 15, 16).

Appellant called Agent Maxwell and Detective Giordano as witnesses at this hearing. Agent Maxwell testi-

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[4] References preceded by "S." refer to suppression hearing minutes of September 3, 1975.

fied that he responded to the radio communication and proceeded to the gas station arriving at the time Agent Thornton was talking to appellant (S 56, 57). Agent Maxwell testified that he was not in a position to hear what, if any, conversation was taking place (S 56). Thereafter, Agent Maxwell searched appellant and found the $1,000 in his pocket (S 60). Before eliciting any statement from appellant, Agent Maxwell advised him of his rights (S 58).

Detective Giordano testified that after he had purchased the camera lenses, while appellant was discussing the box of camera accessories, agents moved in and arrested both appellant and himself (S 84, 87, 88). Detective Giordano was immediately separated from appellant and did not hear anyone advise appellant of his rights (S 90).

Appellant offered in evidence the transcript of the recording from the device worn by Detective Giordano (S 113). Appellant contended that "inconsistencies" in the testimony of Agents Thornton and Maxwell, and the failure of Thornton's advise of rights to appear on the recording seriously impeached the testimony of Thornton. With regard to the seizure of the stolen camera lenses and accessories, appellant contended that a search warrant was required (S 115, 119).

In denying both these motions, the district court stated (S 122):

> I find that Thornton gave tee [the] defendant an adequate warning when he first apprehended him; and I find that the other warnings, while they certainly helped, that he had been given an adequate warning were unnecessary in the light of the first warning.

> Secondly, I find that no warrant was needed since what search there was took place as an incident to the arrest immediately following the commission of the crime, and the crime was committed in the sight [of] one of the witnesses who testified here.

3. Prior to the imposition of sentence, the district court allowed appellant to re-open the suppression hearing to call additional witnesses who were present at the time of appellant's arrest (N 4).[5]

Agent Kopeski testified that at the time of the arrest he was in another surveillance vehicle with Agent Gratton. Their jobs were to monitor the recording device secreted on Detective Giordano and to photograph the events as they occurred at the gas station (N 6). Agent Kopeski heard voices over the transmitter after appellant's arrest, but did not recall what specifically was said by whom (N 10, 11).

Sergeant Richard Gregory, New York City Police Department, testified that upon his arrival at the gas station he moved Detective Giordano approximately ten feet away from appellant and then performed a search (N 22, 23). Prior to placing Detective Giordano in a car, Sergeant Gregory overheard Agent Thornton advise appellant of his rights (N 27).

Agent Thomas Smith testified that when he arrived at the gas station it was his job to secure the automobile and stolen merchandise. While doing this, Agent Smith overheard Agent Thornton advise the appellant of his rights (N 38).

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[5] References preceded by "N." indicate suppression hearing minutes of November 21, 1975.

In denying appellant's renewed motion to suppress his admissions, the district court found that appellant was adequately advised of his rights (Sentencing minutes, December 5, 1975, p. 15).

ARGUMENT

POINT I

The District Court properly admitted into evidence appellant's post arrest statements.

Appellant initially contends that the district court erred in relying upon the testimony of the arresting officers to determine whether proper *Miranda* warnings were given prior to appellant's admissions. In his brief, appellant selects certain portions of the testimony of U.S. Customs Agents Thornton and Maxwell which he contends contains inconsistencies sufficient to deem their testimony unreliable (Appellant's brief pp. 3-12).

The district court which was confronted with these inconsistencies, credited Agent Thornton's testimony and found he adequately advised appellant of his *Miranda* rights. This finding which is fully supported by the evidence, is proper and should not be overturned *United States* v. *Rose*, 493 F.2d 1191, 1194 (2d Cir. 1974).

At the suppression hearing, the Government called Agent Thornton who testified that he proceeded to appellant's gas station upon receipt of a radio communication which indicated that the transaction between Giordano and appellant had occurred (S 8, 18). Thornton stated that he arrested appellant and advised him of his rights. Moments later, other agents arrived at appellant's gas station. Agent Maxwell, after recovering $1,000 from appellant's pants pocket, confronted appellant with this

money (S 8, 11). Appellant responded to Agent Maxwell's inquiry that the money was for gas (S 10, 11). Thornton further testified that after transporting appellant to U.S. Customs offices for processing, he again advised appellant of his rights (S 12-14).

Appellant called Agent Maxwell and Detective Giordano as witnesses at the suppression hearing. Agent Maxwell testified that upon his arrival at the gas station he observed Thornton and appellant together, but he was not able to overhear any conversation (S 56, 57). However, Maxwell stated that prior to asking appellant about the $1,000 recovered from his pocket, he advised appellant, of his rights (S 58).

Appellant, relying upon the transcript of the recording from the devise worn by Giordano which contained portions of conversations occurring after the agents arrived at the gas station but no advise of rights by Agent Thornton, argued this conclusively proved that no such rights were given. However, Detective Giordano testified that upon his arrest he was immediately separated from appellant and did not hear anyone advise appellant of his rights (S 90). The district court, rejecting appellant's argument, recognized that if Giordano was unable to hear any conversation between Thornton and appellant, the recording devise he wore would not pick up such a conversation. Further, appellant did not take the stand at the hearing to contradict the testimony though he could have done so without fear that what he said would be used to incriminate him. *Simmons* v. *United States*, 390 U.S. 377 (1968); see also, *United States* v. *Nussen*, — F.2d —, January 30, 1976 (2d Cir.) Slip op. 420.

Upon the testimony of these witnesses, Judge Platt found that Thornton adequately advised appellant of his rights (S 122). However, upon the insistence of appellant that additional witnesses could shed light of the issue,

the district court permitted appellant to re-open the hearing prior to the imposition of sentence. Appellant called three officers who were present at the time of appellant's arrest. Two of these witnesses, Sergeant Gregory and Agent Smith, testified that while they were performing other duties at the scene of the arrest they each overheard portions of Thornton's advise of rights to appellant (N 27, 38).

Appellant was afforded every opportunity to fully explore the facts surrounding the issue of Thornton's advise of rights given to appellant. Appellant's post-trial inquiry further supported Thornton's testimony. Moreover, the minor inconsistencies in the testimony presented at the suppression hearing if anything, support its credibility, as the district court recognized (Sentencing minutes, December 5, 1975, p. 22):

> I think strangely enough this testimony where each of them had some inconsistency, really minor inconsistency at times as to the methods has a far greater ring of truth when four guys get on the stand and parrot one another.

Clearly, considering the ample evidence presented at the suppression hearing, the district court properly found that appellant was given the *Miranda* warnings by Thornton, the first arresting agent.

POINT II

The arrest of appellant and subsequent seizure of stolen goods from his automobile were proper.

Appellant next contends the agents lacked probable cause to arrest, thus, the subsequent seizure of stolen goods from his automobile was improper. We submit appellant's argument belies the facts and has no legal basis.

A. There was sufficient probable cause to arrest appellant

The test to be applied in determining whether probable cause exists to make an arrest is whether the facts available to the agents at the time of arrest are "sufficient to warrant a prudent man in believing that the [defendant] had committed . . . an offense." *Beck* v. *Ohio*, 379 U.S. 87, 91 (1964). This assessment is based upon the collective knowledge of the agents rather than on that of the arresting officer alone. *United States* v. *Canieso*, 470 F.2d 1224, 1230, n.7 (2d Cir. 1972); *Smith* v. *United States*, 358 F.2d 833, 835 (D.C. Cir. 1966), *cert. denied*, 386 U.S. 1008 (1967); *Williams* v. *United States*, 308 F.2d 326, 327 (D.C. Cir. 1962).

In this case, agents in surveillance observed and overheard fellow officer Giordano conduct a cash transaction for camera lenses at considerably below their market value at appellant's station wagon parked in his gas station in Brooklyn. These lenses were actually observed in appellant's station wagon at the time of this transaction. Moreover, on the previous day, the agents recovered a stolen lens from a friend of appellant who had received this lens from appellant. We submit these facts provided the arresting agents with sufficient reason to believe appellant was in possession of stolen goods. See, *Brinegar* v. *United States*, 338 U.S. 160 (1949); *United States* v. *Tramunti*, 513 F.2d 1087 (2d Cir. 1975). Indeed, these facts were sufficient to support the jury's verdict.

B. The seizure of stolen goods from appellant's automobile was proper

Appellant's contention that the seizure of the stolen camera lenses and accessories from his automobile at the time of his arrest was improper is frivolous. The district court properly denied appellant's suppression motion find-

ing the seizure of the goods was the result of a search incident to the arrest. Arrested at the open tailgate of his station wagon while selling the stolen goods to Giordano, appellant certainly was "within [the] immediate control" of the boxes containing the stolen goods, justifying a search under *Chimel* v. *California*, 395 U.S. 752, 763 (1969); see also, *United States* v. *Robinson*, 414 U.S. 218 (1973).

Further, the agents observations of one of the lenses from the boxes in appellant's automobile, together with their knowledge of the stolen lens obtained from Zolfo, certainly provided them with probable cause to believe that the auto contained contraband. Thus, the agents could properly search appellant's station wagon *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1973); *Chambers* v. *Maroney*, 399 U.S. 42, 48 (1970); *Carroll* v. *United States*, 267 U.S. 132 (1925).

Moreover, the camera lenses in appellant's car which were observed by the agents were in plain view, justifying their seizure. *Harris* v. *United States*, 390 U.S. 234 (1868); *United States ex rel. Williams* v. *LaVallee*, 415 F.2d 643 (2d Cir. 1969).

Further, the law is well settled that when an automobile is seized pursuant to statutory authority, a warrantless search is proper. *United States* v. *Zaicek*, 519 F.2d 412, 414 (2d Cir. 1975); *United States* v. *Capra*, 501 F.2d 267 (2d Cir. 1974), *cert. denied*, 420 U.S. 990 (1975); *United States* v. *Francolino*, 367 F.2d 1013 (1966), *cert. denied*, 386 U.S. 960 (1967). The only requirement is that there be probable cause to believe that the vehicle is seizable *United States* v. *Zaicek*, *supra*, 519 F.2d at 414. Here the agents had probable cause to believe that appellant's auto was being used to facilitate the sale of contraband, thus seizable pursuant to Title 19 U.S.C. § 1581(f). *Cf. United States* v. *LaVecchia*, 513 F.2d 1210, 1216 (2d Cir. 1975).

Based on these facts, appellant can hardly contend his arrest and the seizure of the stolen goods from his car were improper.

POINT III

The District Court properly instructed the jury concerning the voluntariness of appellant's admissions in compliance with Title 18, U.S.C. §3501(A).

Appellant contends that Judge Platt failed to comply with the statutory mandate established by Title 18, U.S.C. Section 3501(a), thus, committing plain error requiring a new trial. *United States* v. *Barry*, 518 F.2d 342 (2d Cir. 1975).

Title 18, U.S.C. Section 3501(a) requires the following concerning the trial court's charge to the jury regarding confessions introduced at trial: "If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all circumstances." Relying upon *United States* v. *Barry*, *supra*, where this Court found the trial court's failure to comply with Title 18, U.S.C. Section 3501(a) was plain error requiring a new trial, appellant contends Judge Platt failed to give a specific charge on the issue of voluntariness.

A reading of the district court's charge pertaining to appellant's statements clearly shows full compliance with Title 18, U.S.C. Section 3501(a).[6] Contrary to appellant's

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[6] The pertinent portion of the district court's charge is as follows:

> Evidence relating to any statement, or act or omission, claimed to have been made or done by a defendant outside

[Footnote continued on following page]

erroneous assertion, Judge Platt went far beyond general boiler plate instruction which was found insufficient in *United States* v. *Barry, supra.* The jury was properly

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of Court, and after a crime has been committed, should always be considered with caution and weighed with great care; and all such evidence should be disregarded entirely, unless the evidence in the case convinces the jury beyond a reasonable doubt that the statement or act or omission was knowingly made or done.

A statement or act or omission is "knowingly" made or done, if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

In determining whether a statement or act or omission claimed to have been made by a defendant outside of court, and after a crime has been committed, was knowingly made or done, the jury should consider the age, sex, training, education, occupation, and physical and mental condition of the defendant, and his treatment while in custody or under interrogation, as shown by the evidence in the case; and also all other circumstances in evidence surrounding the making of the statement or act or omission, including whether, before the statement or act or omission was made or done, the defendant knew or had been told and understood that he was not obligated, or required to make or do the statement or act or omission claimed to have been made or done by him; that any statement or act or omission which he might make could be used against him in court; that he was entitled to the assistance of counsel before making any statement, either oral or in writing, or before doing any act or omission; and that if he was without money or means to retain counsel of his own choice, an attorney would be appointed to advise and represent him free of cost or obligation.

If the evidence in the case does not convince beyond a reasonable doubt that a confession was made voluntarily and intentionally, you should disregard it entirely. On the other hand, if the evidence in the case does show beyond a reasonable doubt that an admission was in fact voluntarily and intentionally made by a defendant, you may consider it as evidence in the case against the defendant who voluntarily and intentionally made the admission. **(A64-A66)**.

instructed that it was their duty to determine if appellant's statements were voluntary after proper warnings had been given. The district court went on to fully explain the factors to weigh in making this determination.

Finally, even if this Court should determine that the lengthy instructions given by Judge Platt did not conform to the requirements of Section 3501(a), we believe that this case is distinguishable from *Barry* in terms of the plain error rationale. Certainly the charge in this case was far more explicit on the issue of voluntariness than in *Barry*. Moreover, evidence of the defendant's guilt apart from the statements that he made (statements which themselves were hardly as incriminating as in *Barry*, which was a full confession) was shown by overwhelming evidence. Accordingly, we believe that this would be an appropriate case in which to preclude appellant from raising this matter on appeal. See *United States* v. *Wiley*, 519 F.2d 1348, 1351 (2d Cir. 1975); *United States* v. *Pinto*, 503 F.2d 718, 723, 724 (2d Cir. 1974).

CONCLUSION

The judgment of conviction should be affirmed.

Dated: February 17, 1976

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
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Assistant United States Attorneys,
Of Counsel.

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

LYDIA FERNANDEZ, being duly sworn, says that on the 18th day of February, 1976, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a Brief for the Appellee of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Theodore Rosenberg, Esq.
125 Schermerhorn St.
Brooklyn, N. Y. 11201

Sworn to before me this
18th day of February, 1976

Olga S. Morgan

OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 1977

Lydia Fernandez

LYDIA FERNANDEZ

SIR:

PLEASE TAKE NOTICE that the within will be presented for settlement and signature to the Clerk of the United States District Court in his office at the U. S. Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on the ____ day of _____, 19____, at 10:30 o'clock in the forenoon.

Dated: Brooklyn, New York,
_____, 19____

_____
United States Attorney,
Attorney for _____

To:
_____
_____
_____
Attorney for _____

SIR:

PLEASE TAKE NOTICE that the within is a true copy of _____duly entered herein on the ____ day of _____ _____, in the office of the Clerk of the U. S. District Court for the Eastern District of New York,
Dated: Brooklyn, New York,
_____, 19____
_____
United States Attorney,
Attorney for _____

To:
_____
_____
_____
Attorney for _____

_____ Action No._____

UNITED STATES DISTRICT COURT
Eastern District of New York

—Against—

_____
United States Attorney,
Attorney for _____
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Due service of a copy of the within _____ _____is hereby admitted.
Dated: _____, 19____

_____
Attorney for _____

FPI-LC-5M-8-73-7355